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Jeanne B. Inouye; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Kelly P. Sheffied; Anne A. Cameron; Deputy Salt Lake District Attorneys; Counsel for Appellee.
Paul Gotay; Counsel for Appellant.

Recommended Citation
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20020939-CA
TRENT TUCKER,	:	
Defendant/Appellant.		

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF MURDER, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-203 (2000), IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, THE HONORABLE SHEILA K. MCCLEVE PRESIDING

FILED
Utah Court of Appeals
OCT - 2 2003
Clerk of the Court

PAUL GOTAY
357 South 200 East, Third Floor
Salt Lake City, UT 84111

Counsel for Appellant

JEANNE B. INOUYE (1618)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Utah Attorney General's Office
160 East 300 South
PO Box 140854
Salt Lake City, UT 84114-0854

KELLY P. SHEFFIELD
ANNE A. CAMERON
Deputy Salt Lake District Attorneys

Counsel for Appellee

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JEANNE B. INOUYE (1618)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Utah Attorney General's Office
160 East 300 South
PO Box 140854
Salt Lake City, UT 84114-0854

KELLY P. SHEFFIELD
ANNE A. CAMERON
Deputy Salt Lake District Attorneys

Counsel for Appellee

PAUL GOTAY
357 South 200 East, Third Floor
Salt Lake City, UT 84111

Counsel for Appellant

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	:	
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Defendant/Appellant.		

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a conviction of murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (2000), in the Third Judicial District, Salt Lake County, the Honorable Sheila K. McCleve presiding. This Court has jurisdiction over cases transferred to it by the Utah Supreme Court under Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2002).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. Did the trial court abuse its discretion or violate defendant's confrontation rights in its rulings on the admissibility of the medical examiner's testimony during direct and cross-examination?

"The trial court has wide discretion" in its rulings on the admissibility of expert testimony, "and such decisions are reviewed under an abuse of discretion standard." *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993) (citations omitted). The reviewing

court will not reverse a decision to admit or exclude expert testimony unless the trial court's decision "exceeds the limits of reasonability." *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (citation omitted).

2. Did defendant adequately brief his claim that the court answered a question by the jury outside defendant's presence, and does the record support defendant's claim?

No standard of review applies.

3. Did the trial court plainly err in suggesting an order of deliberation?

To demonstrate plain error a defendant must show that error occurred, that it was obvious, and that it was harmful. *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993). This Court reviews "jury instructions in their entirety and will affirm when the instructions as a whole fairly instruct the jury on the law applicable to the case." *State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997).

4. Did the prosecutor improperly question a gun expert about the gun's flash or the propensity of the gun to fire without a trigger pull, where the parties had stipulated that the expert could testify to how the gun operated? If the gun expert "volunteered" improper testimony, did the court's curative instruction render that testimony harmless? In any event, where the evidence was otherwise admissible and where defendant did not move for a continuance, can defendant claim error on appeal for lack of notice?

This Court "will not reverse a trial court's denial of a motion based on prosecutorial misconduct absent an abuse of discretion. This standard is met only if the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant." *State v.*

Pritchett, 2003 UT 24, ¶ 10, 69 P.3d 1278. An instruction to the jury to disregard an improper answer is sufficient if it dispels any prejudice. *State v. Harmon*, 956 P.2d 262, 272-73 (Utah 1998). Further, failure to seek a continuance waives a claim of error based on lack of notice. *See State v. Gonzales*, 2002 UT App 256, ¶ 13, 56 P.3d 969.

5. Did the trial court properly deny defendant's motion for a new trial where defendant's proffered testimony was neither "newly discovered" nor admissible?

"[T]he decision to grant or deny a new trial is a matter of discretion with the trial court and will not be reversed absent a clear abuse of that discretion." *State v. Williams*, 712 P.2d 220, 222 (Utah 1985) (citation omitted).

6. Did the evidence suffice to sustain the verdict?

A court will find the evidence insufficient only when, viewed in a light most favorable to the verdict, the evidence is so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he [or she] was convicted." *State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (alteration in original).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 76-2-103 (1999);
Utah Code Ann. § 76-5-203 (2000);
Utah Code Ann. § 76-5-205 (1999);
Utah Code Ann. § 76-5-206 (1999);
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Utah R. Crim. P. 19.

STATEMENT OF THE CASE

Defendant was charged with murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (2000). R. 41-42. The trial court asked the jury to determine whether defendant was guilty of murder, guilty of a lesser included offense of manslaughter or negligent homicide, or not guilty . R. 246-290, 338-343. The jury found defendant guilty of murder. R. 338. Defendant was sentenced to an indeterminate prison term of five years to life. R. 408-409. He timely appealed. R. 469-70.

STATEMENT OF THE FACTS

The crime. Defendant shared a home with his father, Tommy Tucker; Tommy's girlfriend, Phyllis Coreen Lenear Agar (Coreen); defendant's younger half- or step-brother, Jeremy Kettler; and Ronald Smith (Ron). R. 489:27-28, 36-37; 490:230-231. On the morning of February 9, 2001, defendant and Coreen argued loudly enough to awaken Jeremy. R. 489:81; 490:237. Jeremy looked down over the stairs and saw defendant with his hands around Coreen's neck. *Id.*

Defendant went to work, but returned later in the day. R. 490:231. Coreen, Jeremy, Ron, and a group of Coreen's friends were gathered at the home. *Id.* at 231-32. The friends included Tina, Barbie, and at least three males, including one named "Magic." R. 489:48, 490:231-32. Defendant joined them in "a lot of drinking." R. 490:231. Later, one of the male friends began a fight with Ron, and defendant and Jeremy jumped in. R. 490:232. While Ron and Jeremy were fighting with the friend, defendant ran downstairs and got a gun. *Id.* When he came back upstairs, two of the male friends were leaving. *Id.*

Defendant placed the gun in his pants and went to the kitchen. *Id.* at 232-33. He found Magic in the kitchen and asked Magic "what the heck he was still doing there." *Id.* at 233. Defendant and Magic began to fight, defendant's gun fell to the floor, and Magic grabbed it and began pistol-whipping defendant. *Id.* Jeremy jumped in and wrested the gun from Magic. *Id.* at 234. Jeremy escorted Magic out. R. 489:54.

Defendant, who had exited the room, reentered and asked for the gun. *Id.* at 55. Jeremy gave it to him. *Id.* Defendant then took Coreen and the gun into the bedroom and closed the door. R. 490:235, 246. A few minutes later, Jeremy heard a gunshot. R. 489:55-56. Jeremy went to the bedroom and tried to open the door, but he had difficulty getting in. *Id.* at 56. He felt resistance as he tried to turn the doorknob. *Id.* When he opened the door, he found defendant in the room and Coreen lying on the floor. *Id.* Jeremy asked defendant, "What [did] you do?" *Id.* at 60. Defendant responded, "I didn't mean to. She made me do it; I didn't mean to." *Id.* Jeremy then punched two holes in the wall and punched defendant, knocking him out. *Id.* at 60-62. Jeremy testified that he had never before knocked anyone unconscious. *Id.* at 62. Jeremy testified that the gun was not cocked when he gave it to defendant. *Id.* at 52.

Defendant, who disappeared, apparently did not assist in efforts to get emergency care for Coreen. R. 490:239-40. When police officers arrived, they found Coreen lying in the bedroom with Tommy Tucker, defendant's father, on one side of her body and Barbara Penman on the other side. R. 487:11. Coreen had suffered a fatal shot that entered her body on the inner side of the left eye. R. 490:184.

Defendant's version. Defendant testified that he wanted to talk to Coreen when he took her into the bedroom and closed the door. R. 490:235, 246. He stated that he asked her what "the heck the deal was with her friends" and threatened to "take care of [Magic's problem]" if Magic was still there. R. 490:235. Defendant said that when he started for the door, Coreen said, "No," grabbed the gun with both of her hands, and pulled it toward herself. *Id.* at 236. He testified that the gun went off accidentally during the struggle. *Id.*

Reminded that the gun was a single-action revolver that would fire only if cocked, defendant testified, "I'm not for sure if I cocked it right then [at the time Jeremy returned it to him] or if I cocked it after I went into the bedroom." *Id.* at 235; *see also* R. 490:148-49.

Medical examiner's testimony. The State called Dr. Edward A. Leis, Utah's deputy chief medical examiner, to testify to the cause and manner of Coreen's death. R. 490:173. He testified that he had examined her body and certified that the cause of death was a gunshot wound to the head. *Id.* at 184. He also testified to a "strangulation type" injury to the neck—two parallel red lines caused by pressure to the neck within twenty-four hours of death. *Id.* at 180-81. He further stated that he found small pinpoint hemorrhages in the eyes and inside the mouth, other injuries consistent with attempted strangulation. *Id.*

Dr. Leis further stated that one of his duties as a medical examiner, when conducting an autopsy, was to certify a manner of death, that is, to assign the death to a statistical classification as (i) a natural death, (ii) a suicide, (iii) an accident, (iv) a

homicide, or (v) a death that occurred in an undetermined manner. *Id.* at 184. He testified that he had certified the manner of Coreen's death as a homicide. *Id.* He explained that, for statistical purposes, a homicide is defined as "a deliberate act of one individual leading to the death of another individual." *Id.*

Dr. Leis clarified, however, that in classifying a gunshot death as a homicide, he does not make a judgment about the shooter's intent. *Id.* at 190. He explained that while, for purposes of his classification scheme, Coreen's death was a homicide, that did not mean that he had determined that the person who inflicted the wound was not "acting under extreme emotional distress." *Id.* at 191.

He further clarified that, under the classification scheme, a gunshot death will only be accidental if the gun is faulty in some respect. *Id.* at 189. In classifying a death as a homicide or as an accident, he therefore does not make a determination of intent, which is a question for a jury to decide. *Id.* at 190, 193. In other words, if "somebody was unaware of a gun being loaded and it was loaded and they pulled the trigger and it fired," killing someone, he would classify the death as a homicide and not as an accident. *Id.* at 189.

The trial judge sustained objections to cross-examination questions about the medical examiner's understanding of the intent of a person who fired a gun, not knowing it was loaded. *Id.* at 189. She also sustained an objection to a question about whether a gunshot wound that the medical examiner classified as a homicide "could be fired under extreme emotional distress" or could be fired by "somebody acting with criminal negligence." *Id.* at 190-91. She did, however, permit the medical examiner to testify that

his definition of homicide "would not exclude someone acting under extreme emotional stress." *Id.* at 191. After the jury was excused, the judge explained that she had permitted defense counsel to cross-examine the medical examiner a couple of times with respect to intent, but that she had disallowed "any kind of speculation or conclusion that was a legal one." *Id.* at 198-99.

Gun expert's testimony. A few days before trial, the State indicated that it planned to call Nicholas J. Roberts, Salt Lake County firearms director and range master, as a gun expert, apparently substituting him for David Wakefield, who was not available to testify. R. 216; 489:24-25; 490:193. Observing that Roberts was a last minute expert, defense counsel stated that he had agreed in advance not to object based on notice, so long as the Roberts' testimony was limited to the description of the physical operation of the gun. R. 489:25. The prosecutor concurred in defense counsel's characterization of the agreement. *Id.*

Roberts testified that the bullet recovered from the victim's head was fired from the revolver identified as State's exhibit 13. R. 490:147. He also testified that in order to fire the gun, the safety had to be removed, the weapon cocked, and the trigger pulled *Id.* at 149.

Roberts also testified that operation of the gun creates a "flash that comes out the front and both sides." *Id.* at 158. When the primer ignites, it passes through a flash hole and lights the gunpowder, building up pressure and popping the bullet from the cylinder through the barrel. *Id.* The flash consists of heated gases and unburned powder. *Id.*

Some of the gases and powder follow the bullet out of the cylinder, and some of them come out the sides. *Id.* at 150-57.

The prosecutor then asked Roberts whether dropping the loaded and cocked gun would cause it to fire. *Id.* at 157. Roberts said that it would not. *Id.* The prosecutor then asked whether throwing the gun would cause it to fire. *Id.* at 159. Roberts again responded that it would not. The prosecutor then asked "what [would] happen[] if there was a struggle over the gun." *Id.* Roberts answered again that the gun would not fire. At this point, defense counsel objected, arguing lack of "foundation for what a 'struggle' means." *Id.* The prosecutor then clarified, "If there were two people playing tug-of-war with the gun." *Id.* Roberts responded, "If two people were playing tug-of-war with this gun that I checked, this gun would still have to have its trigger pulled to have been fired. And there would be burning of somebody. Somebody would be burned." *Id.*

Defendant objected, arguing that this testimony was beyond the scope of the agreement between the prosecution and the defense. *Id.* at 150, 159. The judge took the objection under advisement. *Id.* at 159. The judge later took argument on the objection. *Id.* at 168. The prosecutor argued that the physics of how a gun works, including the fact that a revolver expels gases, was within the agreement. *Id.* at 168-69. The judge concluded that the testimony was generally within the scope of the agreement, but struck the "volunteered" response that "somebody would have been burned." *Id.* at 169.

The judge asked defense counsel whether he would like her to tell the jury that the statement had been stricken. *Id.* At defense counsel's request, the judge told the jury that

they should disregard the testimony about someone's being burned. *Id.* at 170. Defendant did not ask for a continuance.

Motion for new trial. While examining Jeremy, the prosecutor asked how Jeremy had been awakened on the day of the shooting. R. 489:68. Jeremy answered that he had been awakened by his employer. *Id.* at 69. The prosecutor then asked Jeremy whether he remembered having made any statements to a police detective, Kelly Kent, about an argument that took place that morning. *Id.* Jeremy said that he did not. *Id.* The prosecutor then showed Jeremy a copy of his recorded interview with Kent. *Id.* at 69-70. Asked again whether he remembered making those statements, he again said that he did not. *Id.*

Kent later testified that Jeremy told her that he was awakened that morning when he heard defendant and Coreen arguing on the stairs. *Id.* at 81. Jeremy told her that "he saw Trent with his hands around Coreen's neck." *Id.*

Following his conviction, defendant moved for a new trial. R. 411-413. Defendant claimed, among other things, that he had newly discovered evidence that he had not choked Coreen. R. 427-428. Attached to the memorandum was the affidavit of Barbara Penman, who stated that she had seen defendant and Coreen together earlier on the day of Coreen's death, that they appeared to be interacting happily, and that Coreen had told her that defendant had not choked her. R. 436. The State responded, arguing that defendant knew that Penman was present on the day of the death and that the evidence she might have presented was available before trial. R. 462. Further, Penman's testimony would be hearsay. R. 464. The trial court denied the motion for a new trial,

holding that "[d]efendant's proffered evidence to assert grounds for a new trial is neither newly discovered nor now admissible." R. 467.

SUMMARY OF THE ARGUMENT

1. The trial court did not err in its rulings on the admissibility of the medical expert's testimony. The medical expert's testimony that he had classified the manner of death as homicide was not testimony regarding the shooter's intent. This testimony was admissible even though the medical examiner relied, to some extent, on information from investigative sources because experts in his field reasonably rely upon this kind of information in forming their opinions. The trial court also properly exercised its discretion when it sustained objections to cross-examination of the medical examiner asking whether hypothetical conduct would demonstrate intent to kill, extreme emotional distress, and criminal negligence.

2. Defendant's claim that the trial court answered a question by the jury when defendant was not present is inadequately briefed and, in any event, unsupported by the record.

3. Defendant invited any error in the jury instructions and therefore is not entitled to plain error review. Defendant has inadequately briefed his plain error claim. In any case, defendant has not demonstrated plain error. He has not shown that the order of deliberation instruction, given as a recommendation and not as a requirement, deprived him of his right to have the jury consider the lesser included offenses. Further, he has not shown that the jury instructions as a whole misled the jury, that the alleged error should have been obvious, or that the alleged error was harmful.

4. The prosecutor's questions about the gun's flash pattern were questions about the operation of the gun and within the prosecution/defense agreement. The prosecutor's questions about the propensity of the gun to go off if dropped, thrown, or tugged were also within the agreement. The gun expert's volunteered testimony that the flash would have burned the hands of someone pulling on the barrel when the gun was fired, if improper, was not prejudicial. The court struck the testimony and gave a curative instruction. In any event, the testimony was not of itself inadmissible, and defendant's failure to seek a continuance to meet any surprise waived his claim.

5. The trial court properly denied defendant's motion for a new trial where defendant claimed he had newly discovered evidence, but where the proffered evidence could have been discovered and produced at trial and where the proffered evidence was, in any case, inadmissible.

6. The evidence sufficed to sustain the verdict. Evidence was sufficient to support the jury's finding beyond a reasonable doubt that defendant shot the victim with the intent to kill or cause serious bodily injury.

ARGUMENT

I.
(Response to defendant's arguments A, B, and C)

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE DEFENDANT'S CONFRONTATION RIGHTS IN ITS RULINGS ON THE ADMISSIBILITY OF THE MEDICAL EXAMINER'S TESTIMONY

"The trial court has wide discretion" in its rulings on the admissibility of expert testimony, "and such decisions are reviewed under an abuse of discretion standard."

State v. Larsen, 865 P.2d 1355, 1361 (Utah 1993) (citations omitted). A reviewing court will not reverse a decision to admit or exclude expert testimony unless the trial court's decision "exceeds the limits of reasonability." *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (citations omitted). Further, a trial court may exclude evidence if its probative value is substantially outweighed by the danger that it will confuse the issues. Utah R. Evid. 403.

A. The medical examiner did not testify to mental state or condition when he testified that he had classified the death as a homicide.

Defendant claims that the medical examiner testified to an issue reserved for the jury when he "was allowed to testify that the manner of death was 'homicide' and that it occurred by a 'deliberate act.'" Br. Aplt. at 30. Defendant claims that this testimony constituted testimony of defendant's intent for purposes of the murder statute. *Id.* In making this argument, defendant misconstrues the testimony and ignores its context. The medical examiner offered no testimony regarding the intent element.

Under rule 704, Utah Rules of Evidence, an expert witness may not testify "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Utah R. Evid. 704(b). This is an issue for the jury. *Id.*

"Criminal homicide constitutes murder if . . . the actor intentionally or knowingly causes the death of another [or] intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another." Utah Code Ann. § 76-5-203(2)(a) & (b). To return a verdict of guilty, the jury must

therefore find not merely that the actor intended to fire a weapon, but that the actor acted with the intent to kill or injure. An expert therefore may not testify regarding a shooter's intent to kill or injure.

Dr. Leis did not offer an opinion regarding the intent element of murder. He testified that as part of his responsibilities as a medical examiner he must offer an opinion about the cause of death and about the manner of death. R. 490:184. His opinion about the manner of death requires that he assign the death to one of five categories of cause—natural cause, accident, suicide, homicide, or undetermined cause. *Id.* He also explained that if a death appears to be the result of an intentional shooting it is classified as a homicide, even though it may be accidental in the sense that the shooter did not intend to kill or hurt anyone. For instance, if "somebody [i]s unaware of a gun being loaded and it [i]s loaded and they pull[] the trigger" and kill a person, the death is classified as a homicide. *Id.* at 189. The death would be classified as an accident only if the gun is "faulty in some capacity." *Id.* Classifying the death as a homicide thus involves no judgment about "the state of mind of the person who may have been involved in firing [a] shot," only his act, and so would not be inconsistent with a jury verdict that the shooter did not intend to cause the death or injury. *Id.* at 190-91

Within this framework, Dr. Leis testified that the cause of death was a gunshot wound to the head. *Id.* at 184. He also testified that he had certified the manner of death as a homicide. *Id.* This testimony is permissible. *See State v. Quas*, 837 P.2d 565, 568 (Utah App. 1992) (suggesting the admissibility of expert testimony that suicide by a gunshot to the eye would be unusual); *see also State v. Kallin*, 877 P.2d 138, 141 (Utah

1994) (upholding the admissibility of an examining pediatrician's testimony that a victim's genital trauma was consistent with abuse); *State v. Tanner*, 675 P.2d 539, 542-44 (Utah 1983) (permitting testimony that injuries were consistent with battered child syndrome and stating that "[a]n expert medical witness may give his opinion as to the means used to inflict a particular injury, based on his deduction from the appearance of the injury itself") (internal quotation and citation omitted), *rev'd on other grounds*, *State v. Doporto*, 935 P.2d 484 (Utah 1997); *State v. Rugebregt*, 965 P.2d 518, 523-24 (Utah App. 1998) (permitting testimony that a victim's physical symptoms were consistent with nonconsensual, forcible sex). *Cf. State v. Jaegar*, 1999 UT 1, ¶¶ 36-37, 973 P.2d 404 (noting medical expert's testimony that autopsy and gunshot residue test showed that victim's death was a homicide, not a suicide).

Thus, defendant gave an opinion that the bullet wound appeared consistent with a shooting by someone other than the victim and by someone who had deliberately pulled the trigger. He did not give an opinion that the person who pulled the trigger intended to kill or seriously injure the victim. *See Sippio v. State*, 714 A.2d 864, 875 (Md. 1998) (testimony that homicide was manner of death was not testimony to shooter's intent).

B. The facts relied upon by the medical expert in forming his opinions were of a type reasonably relied upon by experts in his field.

Under the rules of evidence, an expert may offer an opinion based on information he perceives or based on facts and data made known to him, if that information is "of a type reasonably relied upon by experts in the particular field in forming opinions." Utah R. Evid. 703; *State v. Kelley*, 2000 UT 41, ¶ 18, 1 P.3d 546. The facts and data need not

be in evidence or even be admissible if an expert in the field would be justified in relying upon them in rendering his opinion. *See State v. Schreuder*, 726 P.2d 1215, 1224 (Utah 1986); *Barson v. E.R. Squibb & Sons*, 682 P.2d 832, 839 (Utah 1984).

Defendant here objects to the medical examiner's testimony at trial because the medical examiner referred to his review of investigative reports when giving preliminary hearing testimony. Br. Aplt. at 34-38. The medical examiner based his trial testimony on his autopsy, on his own observations of the body at the crime scene, and on "the investigative information I had available to me." R. 490:185. His testimony based on his autopsy and on his own observations of the body is unchallenged. To the extent his testimony was based on investigative information from facts and data made known to him by investigating officers, his testimony was permissible under the rules because the facts and data were of a type reasonably relied upon by medical examiners. Dr. Leis himself testified at the preliminary hearing that medical examiners commonly rely on investigative sources in formulating their opinions. *See* R. 487:31-32. Further, case law supports the propriety of a medical examiner's reliance on information received from investigating officers. *See, e.g., Sippio*, 714 A.2d at 874 (permitting medical examiner's opinion based on facts determined by the examiner, "as well as relevant information obtained from a reliable police source"); *State v. Stewart*, 643 N.W.2d 281, 294 (Minn. 2002) (permitting medical examiner's testimony based on autopsy finding *and* on information provided by police). *Cf. State v. Mead*, 2001 UT 58, ¶¶ 13, 41, 27 P.3d 1115 (holding proper medical examiner's testimony that, upon applying the physical evidence

to a fact pattern presented by police investigators, he had changed his classification of a victim's death from suicide to homicide).

C. The trial court did not abuse its discretion or violate defendant's confrontation rights when it sustained several objections to cross-examination, where the probative value of the evidence defendant sought to elicit was substantially outweighed by the danger that it would confuse the issues and mislead the jury.

A defendant has the constitutional right to confront the witnesses against him. *State v. Chavez*, 2002 UT App 9, ¶ 18, 41 P.3d 1137. A criminal defendant may "state[] a violation of the Confrontation Clause by showing that he was prohibited from engaging in [certain] otherwise appropriate cross-examination . . . ." *Id.* (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). But "otherwise appropriate cross-examination" does not include the elicitation of inadmissible or properly excluded testimony. "[An] accused does not have an unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). The United States Supreme Court has clearly articulated this limitation on cross-examination: "[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Under the evidentiary rules, a trial court may exclude evidence where its probative value is substantially outweighed by the danger that it will confuse the issues or mislead the jury. Utah R. Evid. 403.

Here, the trial court permitted defendant to cross-examine the medical examiner. The trial court did not place any limitation on cross-examination. The trial court did,

however, sustain the prosecution's objections to defense counsel's questions about the intent of a hypothetical shooter. R. 490:189 ("[Y]ou would agree that [a theoretical person] wasn't intending . . . ."). The court also sustained objections to questions requiring legal conclusions. R. 490:190 ("[A] gunshot wound that you classified for your purposes as a homicide could be fired under extreme emotional distress?"); 490:191 ("And because you're not using intent in making your determinations, it wouldn't specifically include somebody acting with criminal negligence. Correct?").

These questions asked for testimony that may have appeared to the jury to be testimony regarding defendant's intent or mental state. An expert witness may not testify as to whether a defendant did or did not have the mental state constituting an element of the offense. *See* Utah R. Evid. 704(b). He may not testify as to whether a defendant was acting under the influence of extreme emotional distress. *See* Utah Code Ann. §§ 76-5-203 & 205 (stating that criminal homicide is manslaughter if the actor commits a homicide which would be murder, but acts "under the influence of extreme emotional distress for which there is a reasonable explanation or excuse"). He may not testify as to whether a defendant was acting with criminal negligence. See Utah Code Ann. § 76-5-206 (stating that "[c]riminal homicide is negligent homicide if the actor, acting with criminal negligence, causes the death of another"). While the cross-examination questions may not technically have asked the expert's opinion of defendant's state of mind, they could have confused the jury on that issue. The probative value of the testimony sought was therefore substantially outweighed by the danger of confusion, especially where other testimony on both direct and cross-examination clearly explained

that the medical examiner's classification of the death as a homicide was not a judgment regarding the shooter's intent. *See* Pont I.A., above, *see also* R. 490:190, 191 (medical examiner's statements that he did not make any judgment about state or mind or intent in reaching a conclusion about the manner of death).

Moreover, whether someone might be acting "under the influence of extreme emotional distress" or whether he might be acting "with criminal negligence" is not within the medical examiner's expertise. *See* Utah R. Evid. 702. An opinion about these matters calls for a legal conclusion, not a medical judgment. Thus, the medical examiner's opinions about these matters is not admissible. *See* Utah R. Evid. 701, 702.

The trial court acted within its discretion when it sustained the prosecutor's objections to defense counsel's questioning regarding these matters. Further, even had the trial court erred, the error was harmless. Defendant sufficiently clarified the meaning of the medical examiner's testimony that the cause of death was homicide and that it occurred by a deliberate act. *See* Point I.A., above. Defendant clarified on cross-examination that the medical examiner did not "use intent in making [his] determinations about the manner of death." R. 490:190. Neither did the medical examiner make any determination about the "state of mind of the person who may have been involved in firing [the] shot." *Id.* at 191. Thus, the excluded testimony would have been merely cumulative of testimony elicited by other questions. No reasonable probability exists of a more favorable outcome, had the excluded testimony been admitted. *See State v. Preece*, 971 P.2d 1 (Utah App. 1998) ("Harmless errors are errors which, although preserved below and presented on appeal, are sufficiently

inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.").

II.

(Response to defendant's argument D)

DEFENDANT'S CLAIM THAT THE COURT ANSWERED A QUESTION BY THE JURY OUTSIDE DEFENDANT'S PRESENCE IS INADEQUATELY BRIEFED AND WITHOUT RECORD SUPPORT

Defendant claims that his right to due process was denied because the trial court discussed with the jury, in defendant's absence, a question submitted by the jury during their deliberations. Br. Aplt. at 41-42. Defendant does not cite to the record nor does he detail any of the circumstances surrounding the incident, if it occurred, or the nature of the question. Defendant has not adequately briefed this issue and this Court should decline to address it. As Utah courts have frequently reiterated, "[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *See State v. Gomez*, 2002 UT 120, ¶ 20, 63 P.3d 72 (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)) (in turn quoting *Williamson v. Opsahl*, 416 N.E.2d 783, 784 (Ill. App. 1981)).

Defendant's claim is, in fact, without record support. "When a defendant predicates error to [an appellate court], he has the duty and responsibility of supporting such an allegation by an adequate record." *State v. Wulffenstein*, 657 P.2d 289, 293 (Utah 1982). "Absent that record, defendant's assignment of error stands as a unilateral allegation which the review[ing] court has no power to determine. [An appellate court]

simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record." *Id.* at 293.

Defendant concedes that no record evidence supports this claim. Br. Aplt. at 25. This Court must therefore assume the regularity of the proceedings below. *See State v. Litherland*, 2000 UT 76, ¶ 11, 12 P.3d 92; *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998).[1]

III.
(Response to defendant's argument E)

ANY ERROR IN THE JURY INSTRUCTIONS WAS INVITED; FURTHER, DEFENDANT HAS NOT DEMONSTRATED THAT THE ORDER OF DELIBERATION INSTRUCTION CONSTITUTED PLAIN ERROR

Defendant claims that the trial court plainly erred when instructing the jury on the order of deliberation.[2] Br. Aplt. at 42. Defense counsel invited any error below and therefore is not entitled to appellate review for plain error. Further, while defendant claims plain error, he argues neither that the error was obvious nor that it was harmful. His claim is thus inadequately briefed, and this Court should decline to address it. In any case, defendant has not demonstrated plain error: he has not shown that error occurred, that it was obvious, and that it was harmful.

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[1] In any event, according to defendant's argument in his motion below, defense counsel was present during the alleged incident and apparently did not object. *See* R. 414. Counsel's failure to object waives defendant's right to presence. *State v. Lee*, 585 P.2d 58 (Utah 1978).

[2] While defendant references instruction 19, his argument addresses instruction 20, the order of deliberation instruction. R. 267-68.

A. Defendant invited any error in the jury instructions.

Rule 19(e), Utah Rules of Criminal Procedure, provides that "[u]nless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice." Utah R. Crim. P. 19(e). However, an instruction may be reviewed under the manifest injustice exception only where counsel "*failed* to object to the instruction." *State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111 (emphasis in original). Review is permitted where counsel "instead of objecting, . . . merely remained silent at trial." *Id.* (internal quotation and citation omitted). "However, if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction, [the appellate court] will not review the instruction under the manifest injustice exception." *Id.* (citations omitted). The rule serves two purposes: first, to afford the trial court the first opportunity to address the claim of error, and, second, to discourage "parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal." *Id.* (internal quotation and citation omitted). Where the trial court asks for objections and a party affirmatively indicates that it has no objections, the party approves the language of the instructions. *Id.* at ¶ 55; *cf. State v. Casey*, 2003 UT 33, ¶ 39 n.10, ___ P.3d ___ (stating that "it would appear that *Hamilton* may preclude application of the plain error analysis under Rule 19(e)," but not addressing the issue because it was not raised in the district court or briefed on appeal).

Here, before instructing the jury on the final day of trial, the court asked counsel for both parties whether they "ha[d] gone over the [final] instructions." R. 491:275.

Counsel stated that they had. *Id.* The court then asked, "Do we need to say more?" *Id.* Defense counsel answered first. *Id.* He said that instructions 11 and 12 were duplicative. *Id.* He also stated, "Then the other concern I have relates to [instructions 17 and 30]," which referred to "omissions." *Id.* at 275-79. The court deleted the duplicative instruction and the references to "omissions." *Id.* at 275, 278. Defense counsel concluded, "That will be fine. Those are my concerns, your Honor." *Id.* at 279. The prosecutor then responded to the court's inquiry, saying, "The State has no concerns with the instructions." *Id.*

Thus, the evidence shows that before the trial court instructed the jury, defense counsel approved the language of the instruction now challenged on appeal. Defense counsel, "by statement or act, affirmatively represented to the court that he . . . had no objection to [the order of deliberation] jury instruction," or to any instruction other than those he had specifically addressed. Defendant thus invited any error and may not argue plain error on appeal.

B. Defendant claims, but does not argue or attempt to demonstrate, plain error; thus, defendant has inadequately briefed his claim and this court should decline to address it.

Even assuming that error was not invited, defendant's plain error claim is inadequately briefed. This Court should therefore decline to address it.

"Objections to written instructions shall be made before the instructions are given to the jury." Utah R. Crim. P. 19(e); *see also State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346 (discussing preservation requirement and plain error exception); *State v. Kazda*, 545

P.2d 190, 193 (Utah 1976) ("when a party fails to make a proper objection to an erroneous instruction . . . he is thereafter precluded from contending error").

Unless a party objects, a jury "instruction may not be assigned as error except to avoid a manifest injustice." Utah R. Crim. P. 19(e). In this context, "manifest injustice" means "plain error." *See State v. Powell*, 872 P.2d 1027, 1029 (Utah 1994) (internal quotation and citation omitted). To demonstrate plain error, a defendant must show that error occurred, that the error should have been obvious, and that the error was harmful. *See Powell*, 872 P.2d at 1031. "[I]f any one of those requirements is not met, plain error is not established." *Id.*

Here, defendant does not cite to the plain error standard in his standard of review, in his summary of the argument, or in the argument itself. *See* Br. Aplt. at 4, 25-26, 42-43. Defendant uses the phrase "plain error" because he did not object below, but he does not make a plain error argument. He does not explain why the claimed error should have been obvious or why it was harmful. In fact, he argues not that the error was harmful, but that the jury instruction "requires reversal for a new trial unless the error was harmless beyond a reasonable doubt." Br. Aplt. at 44. Defendant thus ignores Utah precedent holding that "the preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346 (citations omitted).

Defendant has not adequately briefed his "plain error" argument. "When a party fails to offer any meaningful analysis, [the court will] decline to reach the merits." *State*

v. Garner, 2002 UT App 234, ¶ 12, 52 P.3d 467. "An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." *State v. Sloan*, 2003 UT App 170, ¶ 13, 72 P.3d 138 (citations omitted). Having failed to make a plain error argument, defendant has improperly shifted the burden of argument to this Court. This Court should decline to address defendant's plain error claim.

C. In any case, defendant has not demonstrated plain error: he has not shown that error occurred, that it was obvious, and that it was harmful.

Defendant claims that the order of deliberation jury instruction prohibited the jury from considering the lesser included offense of negligent homicide and "violated his right to present a defense." Br. Aplt. at 44. Defendant did not object below and therefore argues plain error on appeal.[3] *Id.* at 42.

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[3] Defendant has not made and could not prevail on an argument that the trial court's denial of his motion for a new trial resuscitated his claim. The trial court denied the motion for a new trial, "adopt[ing] plaintiff's arguments in support of the denial." R. 466. In opposing the motion, the State had argued that "defendant's failure to object to a specific jury instruction precludes the defendant from later attacking the verdict based upon that instruction." R. 452-53. As an alternative, the State had argued that defendant had not met any of the plain error requirements. R. 454-455. Thus, in denying the motion for the reasons given by the State, the trial court found the claim untimely as well as without merit. A ruling that a claim is untimely does not resuscitate the claim. *Cf. State v. Parker*, 872 P.2d 1041, 1044 (Utah App. 1994) (holding that when trial court considered the merits of a motion for relief from judgment it de facto considered the motion as timely).

Further, under the Utah Supreme Court's recent decision in *Casey*, a trial court's post-verdict ruling on the merits of an instructional error claim does not resuscitate it. In *Casey*, the supreme court treated a claim of error as unpreserved and required the defendant to show plain error even though the trial court had addressed the accuracy of the instruction in a motion for a new trial. 2003 UT 33 at ¶¶ 39, 45. This decision comports with the purpose underlying rule 19(e), that is, to require objections to jury

To prevail on this claim, defendant must show that error occurred, that the error should have been obvious, and that the error was harmful. *Dunn*, 850 P.2d at 1208. To show error, defendant must not only demonstrate some inaccuracy in one or more instructions, but must also demonstrate that "the instructions taken as a whole" misled the jury. *See, e.g., Cheves v. Williams*, 1999 UT 86, ¶ 37, 993 P.2d 191 ("As we have repeatedly held, if the jury instructions as a whole fairly instruct the jury on the applicable law, reversible error does not arise merely because one jury instruction, standing alone, is not as accurate as it might have been.") (internal quotation and citation omitted); *State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997) ("[W]e review jury instructions in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case."); *State v. Hobbs*, 2003 UT App 27, ¶ 31, 64 P.3d 1218 ("Jury instructions will be affirmed when the instructions, taken as a whole, fairly tender the case to the jury [even where] one or more of the instructions, standing alone, are not as full or accurate as they might have been.") (internal quotation and citation omitted).

1. Background.

Prior to closing argument, the trial court gave jury instructions, including instruction 20, which is reproduced here in its entirety:

> The following is a *suggested but not required* order of deliberation to guide you in considering your verdict options.

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instructions at a time when the trial court can *both* correct any error *and* give any corrected instruction to the jury.

First, you should determine whether or not the evidence has established the crime of Murder. If you unanimously find that all the elements of Murder[] have been proven beyond a reasonable doubt, you should not immediately convict the defendant of Murder. Instead, you should consider whether the defendant also caused the death under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. If the evidence establishes beyond a reasonable doubt that the defendant caused the death under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse, then you must find that the defendant is guilty of Manslaughter and not of Murder.

On the other hand, if you unanimously agree that the evidence has failed to establish any of the elements of Murder, beyond a reasonable doubt, you should consider whether the defendant is guilty of Negligent Homicide. If you unanimously agree that the evidence establish[es] all of the elements of Negligent Homicide, you must find the defendant guilty of Negligent Homicide. However, if you unanimously agree that the evidence has failed to establish any of the elements of Negligent Homicide, beyond a reasonable doubt, you must find the defendant not guilty.

R. 267-68; 491:280 (emphasis added).

The court gave the jury several other instructions relevant to defendant's claim.

- Instruction 2 charged the jury to consider and construe all of the instructions "as one connected whole." R. 247.

- Instruction 9 provided that "[i]n considering the matter of the affirmative defense of acting under extreme emotional distress for which there is a reasonable explanation . . . you are instructed that a defendant does not have to establish such defense by any burden of proof." R. 254. "Rather, if there is some evidence which tends to show that the defendant acted under extreme emotional distress for which there is a reasonable explanation, the State must prove beyond a reasonable doubt that the defendant did not act under such extreme emotional distress." *Id.*

- Instructions 10 directed the jury "to consider as an alternative whether or not the defendant is guilty of the crime of Negligent Homicide." R. 255. Instruction 11 defined criminal negligence, and instruction 12 advised the jury that "criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another." R. 256-57.

- Instruction 21 stated that "[i]f you find that the defendant in this case has committed a public offense and there is reasonable doubt as to which of two or more degrees the defendant is guilty, you must convict the defendant only of the lower degree." R. 269.

- Instruction 33 provided "[t]hat the verdict must express the individual opinion of each juror," and instruction 38 cautioned that "you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors." R. 281, 286.

- Instruction 41, the verdict instruction, stated that "it requires a unanimous concurrence of all the jurors to find a verdict." R. 289.

2. Instruction 20 did not mandate an order of deliberation. Further, in the context of the instructions as a whole, it could not reasonably have created any confusion.

Defendant claims that instruction 20 "improperly required the jury to 'unanimously agree that the evidence has failed to establish any of the elements of Murder' before they could consider the lesser-included offense of Negligent Homicide." Br. Aplt at 43-44. Defendant explains, "A proper instruction would have directed the jurors that they could consider the lesser-included offense if they did not unanimously agree that all the elements of murder were met." *Id.* at 44.

The Utah Supreme Court has stated that "it would be well . . . to avoid instructing [jury members] that they must find the defendant not guilty of the charged offense before they may consider lesser included offenses." *State v. Gardner*, 789 P.2d 273, 284 (Utah 1989). It is better to instruct "that they should consider lesser included offenses if they do not find the defendant guilty of the charged offense." *Id.* This difference is "subtle," but "it avoids any possible misunderstanding that the jury must, by a unanimous vote,

acquit the defendant on the charged offense before it may consider the lesser offense." *Id.*

Nonetheless, the court has never reversed because an order of deliberation instruction could be misleading where the instruction *suggested*, but did not require the order of deliberation. Neither has the court reversed because an order of deliberation instruction was by itself misleading where the instruction, when read in connection with the other instructions, would not have deprived the defendant of the right to proper consideration of lesser included offenses.

a. The instruction here suggested, but did not mandate an order of deliberation.

The Utah Supreme Court addressed potentially confusing order of deliberation instructions in *State v. Powell*, 872 P.2d 1027 (Utah 1994), *State v. Piansiaksone*, 954 P.2d 861 (Utah 1998), and *State v. Shumway*, 2002 UT 124, 63 P.3d 94.

In *Powell*, the trial court gave the jury oral instructions stating that if they found the defendant not guilty of murder in the second degree, they should determine whether he was guilty of manslaughter, and if they determined that he was not guilty of manslaughter, they should determine whether he was guilty of negligent homicide. 872 P.2d at 1031. Although this instruction indicated the jury should begin by determining whether defendant was guilty of murder, move to manslaughter only if they found the defendant "not guilty" of murder, and move to negligent homicide only if they found defendant "not guilty" of manslaughter, the supreme court did not reverse. *Id.* at 1032. The court construed the instructions, read as a whole "as suggesting to the jury a logical approach to the three criminal homicide alternatives rather than as commanding an

absolute progression through the possible options." *Id.* Thus, the court stated, "We do not believe that a juror would have felt compelled to acquit as to the second degree murder charge before considering the lesser included offenses." *Id.*

On the other hand, in *Piansiaksone*, where the supreme court reversed, the order of deliberation instruction was given as a requirement, *not* "by way of suggestion and recommendation." *See* 954 P.2d at 870. Likewise, in *Shumway*, where the supreme court also reversed, the trial court gave the order of deliberation instruction as a requirement, not a suggestion. *See* 2002 UT 124 at ¶¶ 4-5. The instruction mandated that the jury find "that the evidence fail[ed] to establish one or more of the elements of Murder" before the jurors could consider lesser included offenses. *Id.*

Here, the first line of instruction 20 is clear: "The following instruction is a suggested but not required order of deliberation to guide you in considering your verdict options." R. 267. Thus, while the instruction may not have been completely clear, it mandated nothing. The jury was free to disregard it. Like the instruction in *Powell*, and unlike the suggestions in *Piansiaksone* and *Shumway*, it suggested, but did not command, a progression through the options. Thus, the potential for confusion did not result in error that could have required reversal.

b. Instruction 20, in the context of the instructions as a whole, could not reasonably have created any confusion.

Further, a reviewing court will not reverse a challenged order of deliberation instruction where the instruction, "when read in connection with the other written instructions given the jury, could not have reasonably created any confusion." *Gardner*,

789 P.2d at 284. When a defendant challenges an order of deliberation instruction, the reviewing court must review the instructions as a whole to determine whether they have misled the jury and thereby deprived the defendant of the right to proper consideration of lesser included offenses. *Id.* Lack of clarity in an order of deliberation instruction does not, of itself, constitute error when the instructions as a whole "allow[] the jury to give proper consideration to the lesser included offenses." *Id.*

In *Gardner*, the trial court gave the jury an instruction similar to the instruction challenged in this case: "If you find [the defendant] not guilty of murder in the first degree, you shall then consider the guilt or innocence of the defendant of the lesser included offense of . . . murder in the second degree." *Id.* at 283-84. Nonetheless, the court found that the instructions as whole permitted proper consideration of the lesser offenses. *Id.* In so doing, the court pointed to instructions (1) requiring a unanimous vote to convict and (2) directing that, if the jury had a reasonable doubt as to which of two degrees of the crime the defendant was guilty, the jury should convict of the lower degree only.

In the instant case, the instructions as a whole permit proper consideration of the lesser offense. Like the instructions in *Gardner*, the instructions here (1) require a unanimous vote to convict and (2) direct the jury to convict on the offense of lower degree if the jury has a reasonable doubt as to which of two degrees of the crime the defendant is guilty. R. 269, 289.

In sum, defendant has not demonstrated that jury instruction 20, which was given by way of recommendation only, and which was clarified by its context in the

instructions as a whole, prohibited the jury from considering the lesser included offense of negligent homicide or violated defendant's right to present a defense.

3. Defendant has not shown that error, if any, was both obvious and harmful.

To demonstrate plain error, a defendant must show that error occurred, that it was obvious, and that it was harmful. *See Powell*, 872 P.2d at 1031. Even assuming error occurred in this case, defendant has not shown that it was obvious. As explained above, the difference between instructing the jury to consider a lesser included offense if they "find the defendant not guilty of the charged offense," rather than "if they do not find the defendant guilty of the charged offense," is "subtle." *Gardner*, 789 P.2d at 284. That which is subtle is not obvious.

Further, the supreme court's precedent has found error in order of deliberation instructions only where the instructions have been given by way of absolute direction and not by means of suggestion. *See Shumway*, 2002 UT App 124 at ¶¶ 4-5; *Piansiaksone*, 954 P.2d at 870. Error therefore should not have been obvious where the trial court took care to give its order or deliberation instruction by way of suggestion only.

Further, defendant has not shown that the challenged instruction was harmful. While, in general, a reviewing court must presume that the jury followed the instructions given by the trial court, that presumption is associated with mandatory instructions. *See State v. Menzies*, 889 P.2d 393, 401 (Utah 1994). With an instruction given merely by way of suggestion, a jury is free to follow or not follow it. Thus, a defendant cannot rely on the presumption to show prejudice. Defendant has not otherwise shown that any error

in the order of deliberation instruction was harmful and cannot prevail on his plain error claim.

IV.

(Response to defendant's arguments F and G)

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON HIS CLAIM OF PROSECUTORIAL MISCONDUCT; NO MISCONDUCT OCCURRED AND, IN ANY CASE, DEFENDANT HAS NOT SHOWN HARM

Defendant raises claims of prosecutorial misconduct in connection with the prosecutor's questioning of the gun expert. Br. Aplt. at 45-47. Defendant first raised these claims in connection with his motion for a new trial. R. 414, 421-25. The trial court denied the motion. R. 466. Thus, on appeal, this Court must determine whether the trial court abused its discretion when it denied defendant's motion. *See State v. Pritchett*, 2003 UT 24, ¶ 10, 69 P.3d 1278.

Defendant's claim is predicated on a pretrial agreement regarding the scope of testimony to be given by the gun expert, Nicholas J. Roberts, apparently a substitute for David Wakefield, who was unavailable to testify. R. 216; 489:24-25; 490:193. Observing that Roberts was a last minute expert, defense counsel stated that he had agreed in advance not to object based on notice, so long as Robert's testimony was limited to the description of the physical operation of the gun. R. 489:25. The prosecutor concurred. *Id.* Thus, defendant is not claiming that the prosecutor adduced testimony that was inherently inadmissible, but that he adduced testimony in violation of the agreement regarding notice.

A. Defendant has not demonstrated that questions about the gun's flash pattern were beyond the scope of the agreement.

Defendant claims that "the prosecutor elicited inadmissible expert testimony about the lack of burn marks on the hands of the deceased." Br. Aplt. at 44. Defendant claims that the prosecutor acted improperly when he questioned the gun expert about the gun's flash pattern and when, during a discussion of whether the gun could fire without a trigger pull, he asked the gun expert what would happen in two people were struggling or playing tug-of-war with the gun. *See id.* at 45-47. Defendant claims that the flash test "was specifically described as being beyond the scope of the agreed testimony" and that "[t]he court agreed that the testimony was inadmissible and sustained the defense's objection to the testimony." *Id.* at 45.

Defendant's claim that the prosecutor's questions about the flash test were beyond the scope of the agreement, however, is without record support. Defendant cites to the trial transcript at 168-69, where defense counsel states only that it was his *own* understanding that the flash test was beyond the scope of the agreement. R. 490:168-69. The prosecutor, however, countered that the flash test was "part of the physics of how [the gun] works and it falls under mechanics," i.e., the physical operation of the gun. *Id.* The trial court agreed with the prosecutor, striking only the gun expert's "volunteered testimony . . . that somebody would have been burned" and stating that the jury did not "have to disregard [any other part of] the answer to the hypothetical question because most of the answer was fine." R. 490:169-70.

Prosecutorial misconduct occurs where a prosecutor asks "questions or [makes] remarks [that] call[] to the jury's attention matters they would not be justified in considering." *State v. Stevenson*, 884 P.2d 1287, 1290 (Utah App. 1994).[4] The trial court reasonably concluded that the prosecutor's questions about what the gun's flash pattern and whether the gun might discharge during a tug-of-war were within questions about the operation of the gun and proper under the notice agreement. R. 490:169-70. The prosecutor's questions did not call the jury's attention to any matter the jury would not have been justified in considering. The trial court therefore properly exercised its discretion when it denied defendant's motion for a mistrial based on prosecutorial misconduct. *See* R. 466. If the gun expert gave improper testimony, that testimony was volunteered, not elicited by improper questioning.

B. No harm occurred where the trial court gave a curative instruction directing the jury to disregard the gun expert's volunteered testimony.

Further, the gun expert's volunteered testimony "that somebody would have been burned" was harmless. The trial court struck the statement and gave a curative instruction. "To demonstrate reversible error stemming from the presentation of evidence ruled inadmissible, but cured by . . . a curative . . . instruction," a defendant "must demonstrate that there [was] an 'overwhelming probability' that the jury [was] unable to follow the court's instructions, and a strong likelihood that the effect [was] 'devastating'

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[4] Prosecutorial misconduct constitutes reversible error only where, "under the circumstances, the jury was probably influenced by the [prosecutor's] remarks" and "there is a reasonable likelihood, that in its absence, there would have been a more favorable result." *Stevenson*, 884 P.2d at 1290.

to [him]." *State v. Mead*, 2001 UT 58, ¶ 50, 27 P.3d 1115, quoting *State v. Harmon*, 956 P.2d 262, 272-73 (Utah 1998), in turn quoting *Greer v. Miller*, 483 U.S. 756, 767 n.8 (1987). Defendant has not shown that probability.[5]

C. Defendant's failure to ask for a continuance waives his claim which is, when reduced to its essence, a claim that defendant lacked notice.

Defendant does not claim that the gun expert's testimony was inherently inadmissible. Rather, he claims that the testimony was introduced in violation of an agreement he made not to object to the gun expert's testimony for lack of notice so long as the gun expert testified only to the operation of the gun. If defendant felt that the prosecutor's questioning exceeded the scope of the agreement and/or that he had been "surprised" by the expert's testimony, he could have requested a continuance to allow him time to meet the evidence. Defendant did not, probably because he did not believe that even with a continuance he could obtain evidence to undermine the testimony.

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[5] Defendant claims that the stricken testimony was prejudicial. Br. Aplt. at 47. Defendant bases this claim on the affidavit of Tawni Hanseen, attached to defendant's motion for a new trial. *See* R. 434-35. Hanseen claims that a juror, Kurt Patterson, told her that the jury found it was significant that there were no burn wounds on the victim's body. *Id.* The affidavit is inadmissible testimony. First, it is hearsay. Second, even had Patterson himself given affidavit testimony, it would have been inadmissible. An affidavit by a juror representing the juror's perception of deliberations may not be considered by a reviewing court unless it refers to an improper outside influence. *See* Utah R. Evid. 606(b); *see also Groen v. Tri-O-Inc.*, 667 P.2d 598, 603 (Utah 1983) (holding that evidence as to what was said and done in the jury room, other than evidence demonstrating that the verdict was determined by chance or resulted from bribery, is inadmissible to impeach a jury verdict); *State v. Lucero*, 866 P.2d 1, 4 (Utah App. 1993) (stating that "inquiries into the thought processes of the jurors are improper"). Moreover, the jury could properly have inferred the likelihood of burns from the admissible and admitted testimony about the gun's flash pattern and the expulsion of hot gases from the sides of the barrel. *See* R. 490:150-57.

Where a defendant's alleged harm is lack of notice, this Court will not review his claim unless he has sought a continuance. *See State v. Gonzales*, 2002 UT App 256, ¶ 13, 56 P.3d 969. The "failure of a defendant to seek a continuance negates any claim of surprise and amounts to a waiver." *Id.* at ¶ 13; *see also State v. Griffiths*, 752 P.2d 879, 883 (Utah 1988) (stating that failure to see continuance to meet evidence, not properly disclosed during discovery, waives relief). For that reason, the trial court properly exercised its discretion when it denied defendant's motion for a new trial and this Court should deny defendant any further review.

V.

(Response to defendant's argument H)

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL WHERE DEFENDANT'S PROFFERED EVIDENCE WAS NEITHER "NEWLY DISCOVERED" NOR ADMISSIBLE

Defendant claims that the affidavit of Barbara Penman constitutes newly discovered evidence to support a new trial. Br. Aplt. at 53-54. The affidavit, first presented to the trial court in support of defendant's motion for a new trial, states that Jeremy told Penman that he had seen defendant choking Coreen, that Penman therefore asked Coreen about the incident, that Coreen said that defendant did not choke her, that Coreen had no marks on her neck, and that Penman knew that defendant did not purposely kill Coreen. *See* R. 436.

While defendant does not cite to his motion for a new trial below, he is apparently claiming that the trial court abused its discretion when it denied his motion for a new trial. *See* R. 467. Defendant cannot prevail on this claim.

A trial court may grant a new trial in the interest of justice if there was any impropriety in the initial trial that had a substantially adverse effect on the rights of a party. Utah R. Crim. P. 24(a). For a defendant to prevail on a motion for a new trial based on newly-discovered evidence, his evidence must meet three criteria:

> (1) It must be such as could not with reasonable diligence have been discovered and produced at trial;
>
> (2) It must not be merely cumulative; and
>
> (3) It must be such as to render a different result probable on the retrial of the case.

State v. James, 819 P.2d 781, 793 (Utah 1991); *accord State v. Loose*, 2000 UT 11, ¶ 16, 994 P.2d 1237. Notably, "'[n]ew evidence is not evidence which was available to defendant but not obtained by him prior to the time of trial. Nor is it evidence that he knew about or could have discovered prior to trial." *State v. Williams*, 712 P.2d 220, 222 (Utah 1985) (citations omitted).

In reviewing a trial court's decision to deny a motion for a new trial, this Court "presume[s] that the discretion of the trial court was properly exercised unless the record clearly shows the contrary." *Goddard v. Hickman*, 685 P.2d 530, 534-35 (Utah 1984) (citation omitted). To constitute an abuse of discretion, the trial court's determination must be "beyond the limits of reasonability." *State v. Hamilton*, 827 P.2d 232, 239-40 (Utah 1992).

Here, defendant claims that Barbara Penman's affidavit testimony is newly discovered testimony. It appears, however, that defendant knew that Penman was present on the day of the shooting. *See* R. 490:231 (defendant's statement that Coreen's friends

were present); 489:48 (Jeremy Kettler's testimony that "Barbie" was present). Further, even if defendant had not known that Penman was present, Officer Gary Trost testified at the preliminary hearing, held five months before trial, that when he arrived at the scene shortly after the shooting, he found the victim, Barbara Penman, and defendant's father in the bedroom. R. 487:11. Defendant was on notice well before trial that Penman was a potential witness.

In any event, the affidavit testimony upon which defendant relies is inadmissible. Defendant seeks to introduce Penman's testimony that Coreen told her that defendant did not choke her on the day of the shooting. Br. Aplt. at 54. The proffered testimony is hearsay. Defendant does not address any exception to the hearsay rules under which the testimony might be admitted, and the State has found none. The only potential exception appears to be rule 804's final exception for the statements of dead and otherwise unavailable declarants "not specifically covered by any . . . exception[] but having equivalent circumstantial guarantees of trustworthiness." Utah R. Evid. 804(b)(5). The statement Penman attributes to Coreen, however, lacks any guarantee of trustworthiness. Further, a statement cannot be admitted under this section unless it is made known to the adverse party prior to trial. *Id.* The trial court properly concluded that the evidence would not have been admissible.

Thus, the trial court did not abuse its discretion when it denied a new trial on the basis of newly discovered evidence. The evidence proffered did not qualify as "newly discovered" and was, in any case, inadmissible.

VI.

(Response to defendant's argument I)

THE EVIDENCE SUFFICED TO SUSTAIN THE VERDICT

Defendant argues that the evidence was insufficient to sustain the verdict. Defendant conceded in his testimony below that "the gun went off . . . [as he was] trying to pull it away from [Coreen]." R. 490:236. He argued, however, that the shooting was accidental. *Id.* at 237. Thus, the issue here is whether the evidence sufficed to sustain the jury's finding beyond a reasonable doubt that defendant shot Coreen, *intending* to kill her or cause her serious bodily harm.

In order to prevail on an insufficiency claim, a defendant must "first marshal all record evidence that supports the challenged finding" and "then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *State v. Pritchett*, 2003 UT 24, ¶ 25, 69 P.3d 1278. He must "demonstrate how the evidence against him was so insufficient that reasonable minds could not have reached the verdict." *Id.* at ¶ 26 (citations omitted).

Defendant has not adequately marshaled the evidence. Rather, he has given a highly abbreviated account of the testimony given by each of the State's witnesses and then evaluated it in the light *least* favorable to the verdict. For instance, in recounting Detective Kelly Kent's testimony, defendant states:

> Detective Kelly Kent then provided objected-to hearsay testimony for the prosecution about an argument she said Jeremy Kettler told her about between the appellant and the victim—an argument Kettler himself did not describe during his testimony. Newly discovered evidence, in fact[,] flatly contradicts the Kent testimony. . . .

Br. Aplt. at 55. Defendant has not properly marshaled the evidence, and this Court should decline to address his sufficiency argument.

In any case, the evidence did suffice to support the verdict and, in particular, the jury finding that defendant had the intent to kill or cause serious bodily injury. "[I]ntent may be proven by circumstantial evidence and reasonable inferences drawn therefrom, and intent is rarely established by direct evidence." *State v. Holgate*, 2000 UT 74, ¶ 26, 10 P.3d 346 (internal quotation and citation omitted). The reviewing court "therefore must look to the circumstantial evidence and all reasonable inferences drawn therefrom to determine whether the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." *Id.* (internal quotation and citation omitted).

Here, the circumstantial evidence sufficed to support the jury's finding on the intent element. While defendant argued that the shooting was an accident, testimony was given from which the jury could have inferred that defendant was angry with Coreen and had a motive to kill her. Defendant had argued with the Coreen on the day of the shooting, had placed his hands on her neck, and had inflicted injuries consistent with attempted strangulation. R. 489:81 490:180-81. Further, defendant had been involved in a fight with Coreen's friends. R. 490:233-34. Defendant himself said that after entering the bedroom he had asked Coreen "what the heck the deal was with her friends." *Id.* at 235. Defendant further said that he "was high strung" and that he asked Coreen "What the hell is [Magic's] problem?" *Id.*

Further, testimony was given that supported an inference that the shooting was intentional rather than accidental and that defendant intentionally prepared for the shooting. The gun expert testified that firing the gun would have required that the safety be removed, the gun cocked, and the trigger pulled. R. 490:149. Jeremy Kettler testified that he did not believe the gun was cocked when he gave it to defendant, immediately before defendant took the victim into the bedroom. R. 489:52. Defendant himself testified that he cocked the weapon either immediately before he entered the bedroom or after he entered the bedroom. R. 490:235. Further, Jeremy testified that when he opened the door and saw the body defendant said, "She made me do it," a statement from which the jury could have inferred intent, despite defendant's contemporaneous disclaimer that he "didn't mean to." R. 489:60.

The wound itself provided further evidence from which the jury could have inferred intent. The bullet had entered Coreen's head at the inner side of the left eye, an unusual location for a wound that ensues from a tug-of-war. R. 490:177. Debris left in the eye showed "a close contact entrance wound," meaning that "the gun was either up next to the skin surface or in close proximity of the skin" at the time it discharged. *Id* at 195. The jury could have inferred that it was unlikely, had a tug-of-war occurred, that Coreen would have pulled the gun close to her eye and thus have inferred the unlikelihood that defendant testified truthfully about the accidental nature of the incident.

The jury also had evidence before it that, rather than assisting the victim, defendant had fled shortly after the shooting and that he had remained a fugitive for almost five months. R 489:97; 490:239-40. "While a defendant's flight from a crime

scene, standing alone, does not support an inference of intentional conduct, the circumstances of a defendant's flight, in addition to other circumstantial evidence, may be adequate to support such an inference." *State v. Holgate*, 2000 UT 74, ¶ 23, 10 P.3d 346 (internal quotation and citation omitted).[6]

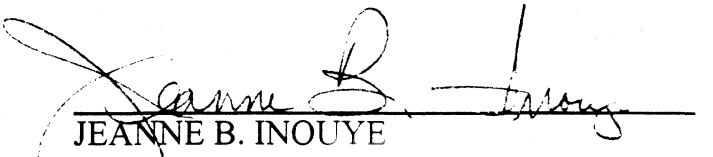
This evidence, while circumstantial, suffices to support a finding that defendant shot the victim, intending to kill her or to cause her serious bodily injury.

CONCLUSION

Defendant's conviction should be affirmed.

Respectfully submitted this 2nd day of October, 2003.

MARK L. SHURTLEFF
Attorney General



JEANNE B. INOUYE
Assistant Attorney General
Attorneys for Appellee

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[6] *See also* 1 *Wharton's Criminal Evidence* § 214, at 450 (Charles E. Torcia ed., 13th ed. 1972) ("Flight by itself is not sufficient to establish the guilt of the defendant, but is merely a circumstance to be considered with other factors as tending to show a consciousness of guilt and therefore guilt itself."), *cited in Holgate*, 2000 UT 74 at ¶ 23 n.6.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2003, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Brief of Appellee to appellant's counsel of record, as follows:

PAUL GOTAY
357 South 200 East, Third Floor
Salt Lake City, UT 84111

Counsel for Appellant

JEANNE B. INOUYE
Assistant Attorney General

ADDENDUM

76-2-103. **Definitions.**

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Amended by Chapter 32, 1974 General Session
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(j) the victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is based on, is caused by, or is related to that official position, act, capacity, or candidacy;

(k) the victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;

(l) the homicide was committed by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered;

(m) the homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;

(n) the homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;

(o) the victim was a person held or otherwise detained as a shield, hostage, or for ransom;

(p) the actor was under a sentence of life imprisonment or a sentence of death at the time of the commission of the homicide; or

(q) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.

(2) Aggravated murder is a capital offense.

(3) (a) It is an affirmative defense to a charge of aggravated murder or attempted aggravated murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) Under Subsection (3)(a)(i), emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection (3)(a)(i) or the reasonable belief of the actor under Subsection (3)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) aggravated murder to murder; and

(ii) attempted aggravated murder to attempted murder.

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76-5-203. Murder.

(1) As used in this section, "predicate offense" means:

(a) violation of Section 58-37d-4 or 58-37d-5, Clandestine Drug Lab Act;

(b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;

(c) kidnapping under Section 76-5-301;

(d) child kidnapping under Section 76-5-301.1;

(e) aggravated kidnapping under Section 76-5-302;

(f) rape of a child under Section 76-5-402.1;

(g) object rape of a child under Section 76-5-402.3;

(h) sodomy upon a child under Section 76-5-403.1;

(i) forcible sexual abuse under Section 76-5-404;

(j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;

(k) rape under Section 76-5-402;

(l) object rape under Section 76-5-402.2;

(m) forcible sodomy under Section 76-5-403;

(n) aggravated sexual assault under Section 76-5-405;

(o) arson under Section 76-6-102;

(p) aggravated arson under Section 76-6-103;

(q) burglary under Section 76-6-202;

(r) aggravated burglary under Section 76-6-203;

(s) robbery under Section 76-6-301;

(t) aggravated robbery under Section 76-6-302; or

(u) escape or aggravated escape under Section 76-8-309.

(2) Criminal homicide constitutes murder if:

(a) the actor intentionally or knowingly causes the death of another;

(b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;

(c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;

(d) (i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense; and

(ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense;

(e) the actor recklessly causes the death of a peace officer while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4; or

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer;

(f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(3); or

(g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.

(3) Murder is a first degree felony.

(4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) Under Subsection (4)(a)(i) emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter. 2000

76-5-204. Death of other than intended victim no defense.

In any prosecution for criminal homicide, evidence that the actor caused the death of a person other than the intended victim shall not constitute a defense for any purpose to criminal homicide. 1973

76-5-205. Manslaughter.

(1) Criminal homicide constitutes manslaughter if the actor:

(a) recklessly causes the death of another;

(b) commits a homicide which would be murder, but the offense is reduced pursuant to Subsection 76-5-203(3); or

(c) commits murder, but special mitigation is established under Section 76-5-205.5.

(2) Manslaughter is a felony of the second degree. 1999

76-5-205.5. Special mitigation reducing the level of criminal homicide offense — Burden of proof — Application to reduce offense.

(1) Special mitigation exists when:

(a) the actor causes the death of another under circumstances that are not legally justified, but the actor acts under a delusion attributable to a mental illness as defined in Section 76-2-305; and

(b) the nature of the delusion is such that, if the facts existed as the defendant believed them to be in his delusional state, those facts would provide a legal justification for his conduct.

(2) This section applies only if the defendant's actions, in light of his delusion, were reasonable from the objective viewpoint of a reasonable person.

(3) A defendant who was under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not claim mitigation of the offense under this section on the basis of mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

(4) (a) If the trier of fact finds the elements of an offense as listed in Subsection (4)(b) are proven beyond a reasonable doubt, and also that the existence of special mitigation under this section is established by a preponderance of the evidence, it shall return a verdict on the reduced charge as provided in Subsection (4)(b).

(b) If under Subsection (4)(a) the offense is:

(i) aggravated murder, the defendant shall instead be found guilty of murder;

(ii) attempted aggravated murder, the defendant shall instead be found guilty of attempted murder;

(iii) murder, the defendant shall instead be found guilty of manslaughter; or

(iv) attempted murder, the defendant shall instead be found guilty of attempted manslaughter.

(5) (a) If a jury is the trier of fact, a unanimous vote of the jury is required to establish the existence of the special mitigation.

(b) If the jury does find special mitigation by a unanimous vote, it shall return a verdict on the reduced charge as provided in Subsection (4).

(c) If the jury finds by a unanimous vote that special mitigation has not been established, it shall convict the defendant of the greater offense for which the prosecution has established all the elements beyond a reasonable doubt.

(d) If the jury is unable to unanimously agree whether or not special mitigation has been established, the result is a hung jury.

(6) (a) If the issue of special mitigation is submitted to the trier of fact, it shall return a special verdict indicating whether the existence of special mitigation has been found.

(b) The trier of fact shall return the special verdict at the same time as the general verdict, to indicate the basis for its general verdict.

(7) Special mitigation under this section does not, in any case, reduce the level of an offense by more than one degree from that offense, the elements of which the evidence has established beyond a reasonable doubt. 1999

76-5-206. Negligent homicide.

(1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

(2) Negligent homicide is a class A misdemeanor. 1973

76-5-207. Automobile homicide.

(1) (a) Criminal homicide is automobile homicide, a third degree felony, if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the vehicle in a negligent manner.

(b) For the purpose of this subsection, "negligent" means simple negligence, the failure to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances.

(2) (a) Criminal homicide is automobile homicide, a second degree felony, if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the motor vehicle in a criminally negligent manner.

(b) For the purpose of this subsection, "criminally negligent" means criminal negligence as defined by Subsection 76-2-103(4).

(3) The standards for chemical breath analysis as provided by Section 41-6-44.3 and the provisions for the admissibility of chemical test results as provided by Section 41-6-44.5 apply to determination and proof of blood alcohol content under this section.

(4) Percent by weight of alcohol in the blood is based upon grams of alcohol per one hundred cubic centimeters of blood.

(5) The fact that a person charged with violating this section is on or has been legally entitled to use alcohol or a drug is not a defense to any charge of violating this section.

(6) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

(b) Under Subsection (4)(a)(i) emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter. 2000

76-5-204. Death of other than intended victim no defense.

In any prosecution for criminal homicide, evidence that the actor caused the death of a person other than the intended victim shall not constitute a defense for any purpose to criminal homicide. 1973

76-5-205. Manslaughter.

(1) Criminal homicide constitutes manslaughter if the actor:

(a) recklessly causes the death of another;

(b) commits a homicide which would be murder, but the offense is reduced pursuant to Subsection 76-5-203(3); or

(c) commits murder, but special mitigation is established under Section 76-5-205.5.

(2) Manslaughter is a felony of the second degree. 1999

76-5-205.5. Special mitigation reducing the level of criminal homicide offense — Burden of proof — Application to reduce offense.

(1) Special mitigation exists when:

(a) the actor causes the death of another under circumstances that are not legally justified, but the actor acts under a delusion attributable to a mental illness as defined in Section 76-2-305; and

(b) the nature of the delusion is such that, if the facts existed as the defendant believed them to be in his delusional state, those facts would provide a legal justification for his conduct.

(2) This section applies only if the defendant's actions, in light of his delusion, were reasonable from the objective viewpoint of a reasonable person.

(3) A defendant who was under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not claim mitigation of the offense under this section on the basis of mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

(4) (a) If the trier of fact finds the elements of an offense as listed in Subsection (4)(b) are proven beyond a reasonable doubt, and also that the existence of special mitigation under this section is established by a preponderance of the evidence, it shall return a verdict on the reduced charge as provided in Subsection (4)(b).

(b) If under Subsection (4)(a) the offense is:

(i) aggravated murder, the defendant shall instead be found guilty of murder;

(ii) attempted aggravated murder, the defendant shall instead be found guilty of attempted murder;

(iii) murder, the defendant shall instead be found guilty of manslaughter; or

(iv) attempted murder, the defendant shall instead be found guilty of attempted manslaughter.

(5) (a) If a jury is the trier of fact, a unanimous vote of the jury is required to establish the existence of the special mitigation.

(b) If the jury does find special mitigation by a unanimous vote, it shall return a verdict on the reduced charge as provided in Subsection (4).

(c) If the jury finds by a unanimous vote that special mitigation has not been established, it shall convict the defendant of the greater offense for which the prosecution has established all the elements beyond a reasonable doubt.

(d) If the jury is unable to unanimously agree whether or not special mitigation has been established, the result is a hung jury.

(6) (a) If the issue of special mitigation is submitted to the trier of fact, it shall return a special verdict indicating whether the existence of special mitigation has been found.

(b) The trier of fact shall return the special verdict at the same time as the general verdict, to indicate the basis for its general verdict.

(7) Special mitigation under this section does not, in any case, reduce the level of an offense by more than one degree from that offense, the elements of which the evidence has established beyond a reasonable doubt. 1999

76-5-206. Negligent homicide.

(1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

(2) Negligent homicide is a class A misdemeanor. 1973

76-5-207. Automobile homicide.

(1) (a) Criminal homicide is automobile homicide, a third degree felony, if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the vehicle in a negligent manner.

(b) For the purpose of this subsection, "negligent" means simple negligence, the failure to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances.

(2) (a) Criminal homicide is automobile homicide, a second degree felony, if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the motor vehicle in a criminally negligent manner.

(b) For the purpose of this subsection, "criminally negligent" means criminal negligence as defined by Subsection 76-2-103(4).

(3) The standards for chemical breath analysis as provided by Section 41-6-44.3 and the provisions for the admissibility of chemical test results as provided by Section 41-6-44.5 apply to determination and proof of blood alcohol content under this section.

(4) Percent by weight of alcohol in the blood is based upon grams of alcohol per one hundred cubic centimeters of blood.

(5) The fact that a person charged with violating this section is on or has been legally entitled to use alcohol or a drug is not a defense to any charge of violating this section.

(6) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

76-5-206. Negligent homicide.

(1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

(2) Negligent homicide is a class A misdemeanor.

Enacted by Chapter 196, 1973 General Session
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Last revised: Thursday, July 03, 2003

Rule 606. **Competency of juror as witness.**

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and comports with Rules 41 and 44, Utah Rules of Evidence (1971), and Utah case law, State v. Gee, 28 Utah 2d 96, 498 P.2d 662 (1972).

Rule 702. **Testimony by experts.**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim. Rule 56(2), Utah Rules of Evidence (1971), was substantially the same.

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and expands Rule 56(2), Utah Rules of Evidence (1971), which limited facts or data not personally known to the expert to those made known to him at the hearing. The provision that the facts or data upon which the expert relies for his opinion in a particular field may be of the type "reasonably relied upon by experts in the particular field in forming opinions," and need not otherwise be admissible also seems to expand Rule 56(2), Utah Rules of Evidence (1971). But see Lamb v. Bangart, 525 P.2d 602 (Utah 1974). Recent Utah cases have tended towards recognition of the position taken by this rule. Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979); Kallas v. Kallas, 614 P.2d 641 (Utah 1980); State v. Clayton, 639 P.2d 168 (Utah 1982).

Rule 704. Opinion on ultimate issue.

(a) Except as provided in subparagraph (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and comports with Rule 56(4), Utah Rules of Evidence (1971). See Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979).

This rule is identical to Rule 704 of the Federal Rules of Evidence as amended in 1984.

Rule 804. Hearsay exceptions; declarant unavailable.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a civil or criminal action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, if the judge finds it was made in good faith.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

ADVISORY COMMITTEE NOTE

Subdivision (a) is comparable to Rule 63(7), Utah Rules of Evidence (1971). Rule 62(7)[(e)], Utah Rules of Evidence (1971), seems to be encompassed in Rule 804(a)(5). Subdivision (a)(5) is a modification of the federal rule which permits judicial discretion to be applied in determining unavailability of a witness.

Subdivision (b)(1) is comparable to Rule 63(3), Utah Rules of Evidence (1971), but the former rule is broader to the extent that it did not limit the admission of the testimony to a situation where the party to the action had the interest and opportunity to develop the testimony. Condas v. Condas, 618 P.2d 491 (Utah 1980); State v. Brooks, 638 P.2d 537 (Utah 1981).

Subdivision (b)(2) is comparable to Rule 63(5), Utah Rules of Evidence (1971), but the former rule was not limited to declarations concerning the cause or circumstances of the impending death nor did it limit dying declarations in criminal prosecutions to homicide cases. The rule has been modified by making it applicable to any civil or criminal proceeding, subject to the qualification that the judge finds the statement to have been made in good faith.

Subdivision (b)(3) is comparable to Rule 63(10), Utah Rules of Evidence (1971), though it does not extend merely to social interests.

Subdivision (b)(4) is similar to Rule 63(24), Utah Rules of Evidence (1971).

Subdivision (b)(5) had no counterpart in Utah Rules of Evidence (1971).

Rule 19. Instructions.

(a) After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties waive this requirement. Final instructions shall be in writing and at least one copy provided to the jury. The court shall provide a copy to any juror who requests one and may, in its discretion, provide a copy to all jurors.

(d) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(e) Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In stating the objection the party shall identify the matter to which the objection is made and the ground of the objection.

(f) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(g) Arguments of the respective parties shall be made after the court has given the jury its final instructions. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.